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MAILED

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OFFICE OF THE DIRECTOR  
TC 3600

Paper No. 17

In re Application of  
Nick (Nicholas Sheppard) Bromer  
Application No. 09/995,097  
Filed: November 27, 2001  
Attorney Docket No.: None  
For: DORSIFLEXION SKATE BRAKE

DECISION ON PETITION  
ON HOLDING OF NON-COMPLIANCE  
OF APPEAL BRIEF  
37 CFR 1.181

Applicant's petition under 37 C.F.R. 1.181 filed March 19, 2003 in application Serial No. 09/995,097, requests withdrawal in part of the Notification of Non-Compliance, mailed on February 25, 2003.

The petition is GRANTED to the extent indicated below.

A petition under 37 CFR 1.181 must include: (1) a statement of facts involved and (2) the point or points to be reviewed and the action requested. There is no fee required for a 1.181 petition.

The petition filed on March 19, 2003, included both elements (1) and (2) above. In the petition, the applicant indicated that in the amendment filed on Sept. 25, 2002, the new grounds of rejection presented in the Final Rejection set forth by the examiner (specifically, with respect to claim 8) was "new and not based upon any amendment to the claim(s), so the action should have been made non-final". In addition, the applicant indicated that this "was not traversed by the examiner" in the subsequent response (see Advisory Action mailed October 7, 2002 wherein the examiner indicated that the model, displayed in the interview of May 15, 2002, necessitated the new grounds of rejection). Thus, although not specifically asked for as relief in this petition, a review of the facts of this application indicate the new rejection of at least one claim was not based upon an amendment to that claim, and thus the Final rejection of Sept. 16, 2002 is deemed to have been premature. Accordingly, the finality of the above-noted Office action, but not the action itself, is hereby withdrawn.

Applicant should note however, that since the model, demonstrated in the interview of May 15, 2002, is not available for reference by the USPTO, specifically the Board of Appeals and Interferences, it is not proper subject matter for consideration of an Appeal. In addition, since the model demonstrated is directed to a different invention not disclosed in the instant application, such is deemed to have no bearing on the instant prosecution (see comments within Interview Summary of May 15, 2002) i.e. a model cannot support a deficient disclosure. Further, the affidavit filed under 37 CFR 1.131 in support thereof had been entered and considered previously by the examiner (see Advisory Action mailed Oct. 7, 2002).

Due to the withdrawal of finality indicated above and the reopening of prosecution, applicant's request to withdraw in part the holding of non-compliance of the Appeal Brief is now deemed to be moot. The case is being forwarded to the Supervisory Legal Instruments Examiner for withdrawal of the finality of the September 16, 2002 Office action and then to the examiner for a subsequent action on the merits based upon the amendment (now an amendment after a non-final Office action) received September 25, 2002. Therefore, the request to withdraw in part the Notification of Non-Compliance mailed Feb. 25, 2003, is dismissed as moot. If applicant wishes a refund or to reapply the appeal fee in a subsequent action, such request should be made in writing.

Any questions concerning his decision should be directed to Supervisory Patent Examiner Brian Johnson at (703) 308-0885.

**SUMMARY:** The petition is **GRANTED** to the extent indicated above.



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BJ/SM: 5/27/03

